

AMENDED IN SENATE JUNE 21, 2001

CALIFORNIA LEGISLATURE—2001–02 REGULAR SESSION

ASSEMBLY BILL

No. 1304

Introduced by Assembly Member Rod Pacheco

February 23, 2001

An act to amend ~~Section~~ *Sections 860 and 1538.5* of the Penal Code, relating to criminal procedure.

LEGISLATIVE COUNSEL'S DIGEST

AB 1304, as amended, Rod Pacheco. Criminal procedure.

Under existing law, if a defendant does not waive his or her right to a preliminary examination, the law does not specify when a prosecutor is required to file an information.

This bill would provide that if a defendant does not waive his or her right to a preliminary examination, the district attorney must file an information within 15 days of the date of the order holding the defendant to answer.

Under existing law, a defendant in a misdemeanor case may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure based on specified grounds. Under existing law, if the defendant's motion is denied, the defendant may appeal that decision. Existing statutory law does not specify whether the trial court has discretion to stay the trial pending disposition of the defendant's appeal, although case law has interpreted existing law to grant the trial court that discretion.

This bill would amend statutory law to specify that if a defendant in a misdemeanor case appeals denial of his or her motion for the return

of property or to suppress evidence, the trial court has discretion to grant a stay of the trial pending disposition of the appeal.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. *Section 860 of the Penal Code is amended to*
2 *read:*

3 860. At the time set for the examination of the case, if the
4 public offense is a felony punishable with death, or is a felony to
5 which the defendant has not pleaded guilty in accordance with
6 Section 859a of this code, then, if the defendant requires the aid of
7 counsel, the magistrate must allow the defendant a reasonable time
8 to send for counsel, and may postpone the examination for not less
9 than two nor more than five days for that purpose. The magistrate
10 must, immediately after the appearance of counsel, or if, after
11 waiting a reasonable time therefor, none appears, proceed to
12 examine the case; provided, however, that a defendant represented
13 by counsel may when brought before the magistrate as provided
14 in Section 858 or at any time subsequent thereto, waive the right
15 to an examination before such magistrate, and thereupon it shall
16 be the duty of the magistrate to make an order holding the
17 defendant to answer, and it shall be the duty of the district attorney
18 within 15 days thereafter, to file in the superior court of the county
19 in which the offense is triable the information; provided, further,
20 however, that nothing contained herein shall prevent the district
21 attorney nor the magistrate from requiring that an examination be
22 held as provided in this chapter. *If the defendant does not waive his*
23 *or her right to an examination, it shall be the duty of the district*
24 *attorney within 15 days from the date of the order holding the*
25 *defendant to answer to file in the superior court of the county in*
26 *which the offense is triable the information.*

27 SEC. 2. Section 1538.5 of the Penal Code is amended to read:

28 1538.5. (a) (1) A defendant may move for the return of
29 property or to suppress as evidence any tangible or intangible thing
30 obtained as a result of a search or seizure on either of the following
31 grounds:

32 (A) The search or seizure without a warrant was unreasonable.

(B) The search or seizure with a warrant was unreasonable because any of the following apply:

(i) The warrant is insufficient on its face.

(ii) The property or evidence obtained is not that described in the warrant.

(iii) There was not probable cause for the issuance of the warrant.

(iv) The method of execution of the warrant violated federal or state constitutional standards.

(v) There was any other violation of federal or state constitutional standards.

(2) A motion pursuant to paragraph (1) shall be made in writing and accompanied by a memorandum of points and authorities and proof of service. The memorandum shall list the specific items of property or evidence sought to be returned or suppressed and shall set forth the factual basis and the legal authorities that demonstrate why the motion should be granted.

(b) When consistent with the procedures set forth in this section and subject to the provisions of Section 170 to 170.6, inclusive, of the Code of Civil Procedure, the motion should first be heard by the magistrate who issued the search warrant if there is a warrant.

(c) Whenever a search or seizure motion is made in the municipal or superior court as provided in this section, the judge or magistrate shall receive evidence on any issue of fact necessary to determine the motion.

(d) If a search or seizure motion is granted pursuant to the proceedings authorized by this section, the property or evidence shall not be admissible against the movant at any trial or other hearing unless further proceedings authorized by this section, Section 871.5, 1238, or 1466 are utilized by the people.

(e) If a search or seizure motion is granted at a trial, the property shall be returned upon order of the court unless it is otherwise subject to lawful detention. If the motion is granted at a special hearing, the property shall be returned upon order of the court only if, after the conclusion of any further proceedings authorized by this section, Section 1238 or 1466, the property is not subject to lawful detention or if the time for initiating the proceedings has expired, whichever occurs last. If the motion is granted at a preliminary hearing, the property shall be returned upon order of court after 10 days unless the property is otherwise subject to

1 lawful detention or unless, within that time, further proceedings
2 authorized by this section, Section 871.5 or 1238 are utilized; if
3 they are utilized, the property shall be returned only if, after the
4 conclusion of the proceedings, the property is no longer subject to
5 lawful detention.

6 (f) (1) If the property or evidence relates to a felony offense
7 initiated by a complaint, the motion shall be made in the superior
8 court only upon filing of an information, except that the defendant
9 may make the motion at the preliminary hearing in the municipal
10 court or in the superior court in a county in which there is no
11 municipal court, but the motion shall be restricted to evidence
12 sought to be introduced by the people at the preliminary hearing.

13 (2) The motion may be made at the preliminary examination
14 only if at least five court days before the date set for the preliminary
15 examination the defendant has filed and personally served on the
16 people a written motion accompanied by a memorandum of points
17 and authorities as required by paragraph (2) of subdivision (a). At
18 the preliminary examination, the magistrate may grant the
19 defendant a continuance for the purpose of filing the motion and
20 serving the motion upon the people, at least five court days before
21 resumption of the examination, upon a showing that the defendant
22 or his or her attorney of record was not aware of the evidence or
23 was not aware of the grounds for suppression before the
24 preliminary examination.

25 (3) Any written response by the people to the motion described
26 in paragraph (2) shall be filed with the court and personally served
27 on the defendant or his or her attorney of record at least two court
28 days prior to the hearing at which the motion is to be made.

29 (g) If the property or evidence relates to a misdemeanor
30 complaint, the motion shall be made in the municipal court or in
31 the superior court in a county in which there is no municipal court
32 before trial and heard prior to trial at a special hearing relating to
33 the validity of the search or seizure. If the property or evidence
34 relates to a misdemeanor filed together with a felony, the
35 procedure provided for a felony in this section and Sections 1238
36 and 1539 shall be applicable.

37 (h) If, prior to the trial of a felony or misdemeanor, opportunity
38 for this motion did not exist or the defendant was not aware of the
39 grounds for the motion, the defendant shall have the right to make

1 this motion during the course of trial in the municipal or superior
2 court.

3 (i) If the property or evidence obtained relates to a felony
4 offense initiated by complaint and the defendant was held to
5 answer at the preliminary hearing, or if the property or evidence
6 relates to a felony offense initiated by indictment, the defendant
7 shall have the right to renew or make the motion in the superior
8 court at a special hearing relating to the validity of the search or
9 seizure which shall be heard prior to trial and at least 10 court days
10 after notice to the people, unless the people are willing to waive a
11 portion of this time. Any written response by the people to the
12 motion shall be filed with the court and personally served on the
13 defendant or his or her attorney of record at least two court days
14 prior to the hearing, unless the defendant is willing to waive a
15 portion of this time. If the offense was initiated by indictment or
16 if the offense was initiated by complaint and no motion was made
17 at the preliminary hearing, the defendant shall have the right to
18 fully litigate the validity of a search or seizure on the basis of the
19 evidence presented at a special hearing. If the motion was made at
20 the preliminary hearing, unless otherwise agreed to by all parties,
21 evidence presented at the special hearing shall be limited to the
22 transcript of the preliminary hearing and to evidence that could not
23 reasonably have been presented at the preliminary hearing, except
24 that the people may recall witnesses who testified at the
25 preliminary hearing. If the people object to the presentation of
26 evidence at the special hearing on the grounds that the evidence
27 could reasonably have been presented at the preliminary hearing,
28 the defendant shall be entitled to an in camera hearing to determine
29 that issue. The superior court shall base its ruling on all evidence
30 presented at the special hearing and on the transcript of the
31 preliminary hearing, and the findings of the magistrate shall be
32 binding on the superior court as to evidence or property not
33 affected by evidence presented at the special hearing. After the
34 special hearing is held in the superior court, any review thereafter
35 desired by the defendant prior to trial shall be by means of an
36 extraordinary writ of mandate or prohibition filed within 30 days
37 after the denial of his or her motion at the special hearing.

38 (j) If the property or evidence relates to a felony offense
39 initiated by complaint and the defendant's motion for the return of
40 the property or suppression of the evidence at the preliminary

1 hearing is granted, and if the defendant is not held to answer at the
2 preliminary hearing, the people may file a new complaint or seek
3 an indictment after the preliminary hearing, and the ruling at the
4 prior hearing shall not be binding in any subsequent proceeding,
5 except as limited by subdivision (p). In the alternative, the people
6 may move to reinstate the complaint, or those parts of the
7 complaint for which the defendant was not held to answer,
8 pursuant to Section 871.5. If the property or evidence relates to a
9 felony offense initiated by complaint and the defendant's motion
10 for the return or suppression of the property or evidence at the
11 preliminary hearing is granted, and if the defendant is held to
12 answer at the preliminary hearing, the ruling at the preliminary
13 hearing shall be binding upon the people unless, upon notice to the
14 defendant and the court in which the preliminary hearing was held
15 and upon the filing of an information, the people, within 15 days
16 after the preliminary hearing, request in the superior court a special
17 hearing, in which case the validity of the search or seizure shall be
18 relitigated de novo on the basis of the evidence presented at the
19 special hearing, and the defendant shall be entitled, as a matter of
20 right, to a continuance of the special hearing for a period of time
21 up to 30 days. The people may not request relitigation of the
22 motion at a special hearing if the defendant's motion has been
23 granted twice. If the defendant's motion is granted at a special
24 hearing in the superior court, the people, if they have additional
25 evidence relating to the motion and not presented at the special
26 hearing, shall have the right to show good cause at the trial why the
27 evidence was not presented at the special hearing and why the prior
28 ruling at the special hearing should not be binding, or the people
29 may seek appellate review as provided in subdivision (o), unless
30 the court, prior to the time the review is sought, has dismissed the
31 case pursuant to Section 1385. If the case has been dismissed
32 pursuant to Section 1385, or if the people dismiss the case on their
33 own motion after the special hearing, the people may file a new
34 complaint or seek an indictment after the special hearing, and the
35 ruling at the special hearing shall not be binding in any subsequent
36 proceeding, except as limited by subdivision (p). If the property or
37 evidence seized relates solely to a misdemeanor complaint, and the
38 defendant made a motion for the return of property or the
39 suppression of evidence in the municipal court or superior court
40 in a county in which there is no municipal court prior to trial, both



the people and defendant shall have the right to appeal any decision of that court relating to that motion to the superior court of the county in which the municipal or superior court is located, in accordance with the California Rules of Court provisions governing appeals to the appellate division in criminal cases. If the people prosecute review by appeal or writ to decision, or any review thereof, in a felony or misdemeanor case, it shall be binding upon them.

(k) If the defendant's motion to return property or suppress evidence is granted and the case is dismissed pursuant to Section 1385, or the people appeal in a misdemeanor case pursuant to subdivision (j), the defendant shall be released pursuant to Section 1318 if he or she is in custody and not returned to custody unless the proceedings are resumed in the trial court and he or she is lawfully ordered by the court to be returned to custody.

If the defendant's motion to return property or suppress evidence is granted and the people file a petition for writ of mandate or prohibition pursuant to subdivision (o) or a notice of intention to file such a petition, the defendant shall be released pursuant to Section 1318, unless (1) he or she is charged with a capital offense in a case where the proof is evident and the presumption great, or (2) he or she is charged with a noncapital offense defined in Chapter 1 (commencing with Section 187) of Title 8 of Part 1, and the court orders that the defendant be discharged from actual custody upon bail.

(l) If the defendant's motion to return property or suppress evidence is granted, the trial of a criminal case shall be stayed to a specified date pending the termination in the appellate courts of this state of the proceedings provided for in this section, Section 871.5, 1238, or 1466 and, except upon stipulation of the parties, pending the time for the initiation of these proceedings. Upon the termination of these proceedings, the defendant shall be brought to trial as provided by Section 1382, and, subject to the provisions of Section 1382, whenever the people have sought and been denied appellate review pursuant to subdivision (o), the defendant shall be entitled to have the action dismissed if he or she is not brought to trial within 30 days of the date of the order that is the last denial of the petition. Nothing contained in this subdivision shall prohibit a court, at the same time as it rules upon the search and seizure motion, from dismissing a case pursuant to Section 1385 when the

1 dismissal is upon the court's own motion and is based upon an
2 order at the special hearing granting the defendant's motion to
3 return property or suppress evidence. In a misdemeanor case, the
4 defendant shall be entitled to a continuance of up to 30 days if he
5 or she intends to file a motion to return property or suppress
6 evidence and needs this time to prepare for the special hearing on
7 the motion. In case of an appeal by the defendant in a misdemeanor
8 case from the denial of the motion, he or she shall be entitled to bail
9 as a matter of right, and, in the discretion of the trial or appellate
10 court, may be released on his or her own recognizance pursuant to
11 Section 1318. In case of an appeal by the defendant in a
12 misdemeanor case from the denial of the motion, the trial court
13 may, in its discretion, grant a stay of the trial pending disposition
14 of the appeal.

15 (m) The proceedings provided for in this section, and Sections
16 871.5, 995, 1238, and 1466 shall constitute the sole and exclusive
17 remedies prior to conviction to test the unreasonableness of a
18 search or seizure where the person making the motion for the
19 return of property or the suppression of evidence is a defendant in
20 a criminal case and the property or thing has been offered or will
21 be offered as evidence against him or her. A defendant may seek
22 further review of the validity of a search or seizure on appeal from
23 a conviction in a criminal case notwithstanding the fact that the
24 judgment of conviction is predicated upon a plea of guilty. Review
25 on appeal may be obtained by the defendant provided that at some
26 stage of the proceedings prior to conviction he or she has moved
27 for the return of property or the suppression of the evidence.

28 (n) This section establishes only the procedure for suppression
29 of evidence and return of property, and does not establish or alter
30 any substantive ground for suppression of evidence or return of
31 property. Nothing contained in this section shall prohibit a person
32 from making a motion, otherwise permitted by law, to return
33 property, brought on the ground that the property obtained is
34 protected by the free speech and press provisions of the United
35 States and California Constitutions. Nothing in this section shall
36 be construed as altering (1) the law of standing to raise the issue
37 of an unreasonable search or seizure; (2) the law relating to the
38 status of the person conducting the search or seizure; (3) the law
39 relating to the burden of proof regarding the search or seizure; (4)
40 the law relating to the reasonableness of a search or seizure



1 regardless of any warrant that may have been utilized; or (5) the
2 procedure and law relating to a motion made pursuant to Section
3 871.5 or 995, or the procedures that may be initiated after the
4 granting or denial of such a motion.

5 (o) Within 30 days after a defendant's motion is granted at a
6 special hearing in the superior court in a felony case, the people
7 may file a petition for writ of mandate or prohibition in the court
8 of appeal, seeking appellate review of the ruling regarding the
9 search or seizure motion. If the trial of a criminal case is set for a
10 date that is less than 30 days from the granting of a defendant's
11 motion at a special hearing in the superior court in a felony case,
12 the people, if they have not filed such a petition and wish to
13 preserve their right to file a petition, shall file in the superior court
14 on or before the trial date or within 10 days after the special
15 hearing, whichever occurs last, a notice of intention to file a
16 petition and shall serve a copy of the notice upon the defendant.

17 (p) If a defendant's motion to return property or suppress
18 evidence in a felony matter has been granted twice, the people may
19 not file a new complaint or seek an indictment in order to relitigate
20 the motion or relitigate the matter de novo at a special hearing in
21 the superior court as otherwise provided by subdivision (j), unless
22 the people discover additional evidence relating to the motion that
23 was not reasonably discoverable at the time of the second
24 suppression hearing. Relitigation of the motion shall be heard by
25 the same judge who granted the motion at the first hearing if the
26 judge is available.

27 (q) The amendments to this section enacted in the 1997 portion
28 of the 1997–98 Regular Session of the Legislature shall apply to
29 all criminal proceedings conducted on or after January 1, 1998.